BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES B. BIGGS	)	
Claimant	)	
VS.	)	
	)	Docket No. 241,091
DAVIS, UNREIN, HUMMER, McCALLISTER,	)	
BIGGS & HEAD, L.L.P.	)	
Respondent	)	
AND	)	
	)	
COMMERCIAL UNION INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant appeals the Award of Administrative Law Judge Bryce D. Benedict dated January 24, 2001, and the Order Nunc Pro Tunc of March 12, 2001. Claimant was limited under K.S.A. 44-510f(a)(4) (Furse 1993) to $50,000 permanent partial general disability for an injury suffered to his left upper extremity, including the shoulder. Claimant argues the legislature did not intend that limitation to apply to scheduled injuries under K.S.A. 1998 Supp. 44-510d. The Board held oral argument on August 15, 2001.

APPEARANCES

Claimant appeared in person as his own counsel. Respondent and its insurance carrier were represented by Ethan L. Vaughan of Kansas City, Missouri.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopts the stipulations contained in the Award and Order Nunc Pro Tunc of the Administrative Law Judge.

ISSUES

Did the legislature intend K.S.A. 44-510f(a)(4) (Furse 1993) to limit permanent partial disability compensation in scheduled injury awards to $50,000?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Appeals Board finds that the Award as modified by the Order Nunc Pro Tunc should be affirmed.

Claimant suffered accidental injury on September 15, 1998, when the vehicle he was driving rolled several times. Claimant suffered a severe injury to his left upper extremity, including his shoulder. The parties have stipulated that claimant has suffered a 78 percent permanent partial disability to the left upper extremity at the shoulder based upon the 80 percent functional impairment opinion of Philip E. Higgs, M.D., and the 76 percent functional impairment opinion of Joseph G. Sankoorikal, M.D. The parties have further stipulated that, should the limitations of K.S.A. 44-510f(a)(4) (Furse 1993) not apply, claimant would be entitled to a disability award in the amount of $62,765.34. This amount does take into consideration 5.14 weeks of temporary total disability compensation previously paid.

This appeal involves only one issue. The question is whether K.S.A. 44-510f (Furse 1993) limits a scheduled injury award under K.S.A. 1998 Supp. 44-510d to $50,000.

K.S.A. 44-510f (Furse 1993) states in part:

> (a) Notwithstanding any provision of the workers compensation act to the contrary, the maximum compensation benefits payable by an employer shall not exceed the following:
> . . .
> (4) for permanent partial disability, where functional impairment only is awarded, $50,000 for an injury or aggravation thereof.

Claimant in his brief to the Board and his submission letter to the Administrative Law Judge argues that the legislative intent in enacting K.S.A. 44-510f(a)(4) (Furse 1993) was to restrict the $50,000 cap to general body disabilities only. In support of his position, claimant has provided information from the House Labor & Industry Committee, dealing with House Bill No. 2354 dated February 12, 1993. This legislative history was part of the package provided by Representative Michael R. O'Neal to the committee and includes

discussion regarding the $50,000 limitation. In Representative O'Neal's "Summary of Workers' Compensation Reform Legislation" information, Note 32 states as follows:

> Limits the maximum award in a functional impairment only general bodily injury case to $50,000.

Claimant argues the information from Representative O'Neal shows a clear legislative intent to restrict K.S.A. 44-510f(a)(4) (Furse 1993) to general body injury cases only.

> One of the more common rules of statutory interpretation is that expressed in the Latin maxim *expressio unius est exclusio alterius, i.e.*, the mention or inclusion of one thing implies the exclusion of another. This rule may be applied to assist in determining actual legislative intent which is not otherwise manifest, although the maxim should not be employed to override or defeat a clearly contrary legislative intention. State v. Luginbill, 223 Kan. 15, 574 P.2d 140 (1977) (quoting In re Olander, 213 Kan. 282, 515 P.2d 1211 [1973]).
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> . . . when legislative intent is in question, we can presume that when the legislature expressly includes specific terms, it intends to exclude any terms not expressly included in the specific list. Matter of Marriage of Killman, 264 Kan. 33, 955 P.2d 1228 (1998) (citing State v. Wood, 231 Kan. 699, 647 P.2d 1327 [1982]).

The Appeals Board finds the language of K.S.A. 44-510f(a)(4) (Furse 1993) to be clear and unambiguous. Accordingly, the Board need not look to legislative intent. The $50,000 limitation applies to permanent partial disability awards where functional impairment only is awarded. The express language is not limited to general body disability injuries only.

Contained in the minutes of the House Committee on Labor & Industry meeting held February 25, 1993, is the comment that Representative Pauls had recommended a $62,500 limitation, rather than the $50,000 limitation. She further recommended that if a serious injury were involved, and the employee was off for more than ten weeks, then the functional impairment would not be capped and the court would pay the higher of the work disability or the functional impairment. Those proposals were also not included in the final draft of the statute.

Additionally, the Kansas Bar Association's Workers Compensation Handbook, when discussing K.S.A. 44-510f(a)(4) (Furse 1993), states that the provision was clearly intended

to prevent large recoveries on functional ratings by highly paid white collar workers who sustain injuries but miss no work. The Handbook goes on to state:

> More than likely it was also intended to apply only to nonscheduled injuries. Unfortunately, the provision does not indicate that. Thus, potentially a scheduled injury could be limited by this provision. Kansas Workers Compensation, 4th ed., KBA, Section 9.04IV, page 9.9 (2000).

Nevertheless, in ascertaining the legislative purpose, the Board must apply the fundamental rules of statutory construction which state:

> It is a fundamental rule of statutory construction, to which all other rules are subordinate, that the intent of the legislature governs if that intent can be ascertained. Matter of Marriage of Killman, *supra* (citing City of Wichita v. 200 South Broadway, 253 Kan. 434, 855 P.2d 956 [1993]).
>
> The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted. When a statute is plain and unambiguous, the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be. Matter of Marriage of Killman, *supra* (citing Brown v. U.S.D. No. 333, 261 Kan. 134, 928 P.2d 57 [1996]).
>
> Stated another way, when a statute is plain and unambiguous, the appellate courts will not speculate as to the legislative intent behind it and will not read such a statute so as to add something not readily found in the statute. Matter of Marriage of Killman, *supra* (citing State v. Alires, 21 Kan. App. 2d 139, Syl. ¶ 2, 895 P.2d 1267 [1995]).

The Board acknowledges there may have been a desire by certain legislators to limit the application of K.S.A. 44-510f(a)(4) (Furse 1993) to general body disabilities. However, the language of the statute does not accomplish that. The language of the statute appears to apply the $50,000 limitation to all permanent partial disability awards, both general body and scheduled. Therefore, claimant's argument that the $50,000 limitation should not apply to scheduled injuries under K.S.A. 1998 Supp. 44-510d fails. As noted by the Administrative Law Judge, it is not the responsibility of a court to add or subtract language from a plain and unambiguous statute.

The Appeals Board, therefore, finds that claimant's recovery in this matter is limited to $50,000 in permanent partial disability benefits under K.S.A. 44-510f(a)(4) (Furse 1993) and the Award of the Administrative Law Judge is, therefore, affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bryce D. Benedict dated January 24, 2001, as modified by the Order Nunc Pro Tunc dated March 12, 2001, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February, 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

We disagree with the majority as we believe the $50,000 cap set forth in K.S.A. 44-510f (Furse 1993) does not apply to awards for scheduled injuries.

The majority turns a blind eye to the events leading to the enactment of the cap. There is little question that the purpose of the cap was to prevent large permanent partial general disability awards going to high-income wage earners who sustained nonscheduled injuries resulting in relatively small functional impairment ratings and who were able to return to their pre-injury jobs.

Under former law, awards for nonscheduled injuries that were based on relatively small functional impairment ratings could produce maximum, or substantial, awards due to the manner in which the permanent disability benefits were computed. When the legislature was debating the $50,000 cap, an injured worker was entitled to receive a maximum of 415 weeks of permanent partial general disability benefits at a weekly rate

that was determined by multiplying the worker's average weekly wage by the disability rating (the work disability or the functional impairment rating, whichever was higher). And the higher the worker's average weekly wage, the higher the weekly benefit, subject, of course, to the limit on the maximum weekly benefit payable. Therefore, in cases in which permanent disability benefits were based upon the worker's functional impairment rating, a small functional impairment rating coupled with a high average weekly wage could result in a maximum award of benefits of $100,000. That is the result that the legislature intended to change with the $50,000 cap.

We do not believe the legislature intended to cap the benefits payable for scheduled injuries as they were already limited based upon the severity of the impairment. Permanent partial disability benefits payable for scheduled injuries were, and still are, computed by multiplying the maximum weeks provided by the schedule by the percentage of functional impairment. Accordingly, when the legislature was debating the cap, a small functional impairment rating produced a relatively small number of weeks of permanent disability benefits payable. Coupled with the limit on the maximum weekly benefit payable, relatively low functional impairment ratings did not, and still do not, produce large awards in scheduled injury claims.

As noted by the majority, the legislative history regarding K.S.A. 44-510f(a)(4) (Furse 1993) only contains references to general body injury cases. In the committee discussions, there was no mention of capping scheduled disability cases. Such history clearly reflects the legislative intent was solely directed at general body injury cases and should not be ignored.

The majority concludes that, regardless of the legislative history, the statutory language of K.S.A. 44-510f(a)(4) (Furse 1993) is plain, unambiguous and applicable to scheduled injury cases. The determination of the extent of permanent partial disability for a scheduled disability is based upon the percentage of functional impairment. Conversely, the determination of the extent of permanent partial disability for a general body injury is based upon the greater of either the percentage of work disability or the percentage of functional impairment. The limiting phrase adopted in K.S.A. 44-510f(a)(4) (Furse 1993) "where functional impairment *only* is awarded" (italics added) makes sense when applied to a general body injury where the injured worker may receive compensation based upon the greater of either the work disability or the functional impairment. However, such language is unnecessary, redundant and ambiguous when applied to a scheduled injury. Accordingly, the language adopted further reflects legislative intent to limit the cap to general body injury cases.

In short, the cap was intended to prevent large awards of permanent partial general disability benefits generated by relatively small functional impairment ratings. For that reason, the cap was not intended to apply to scheduled injury awards.

Lastly, the majority concludes it would be an absurd statutory construction to allow a worker with a scheduled disability, who returns to work, to recover more benefits than a similarly situated worker with a whole body disability. As noted in Pruter v. Larned State Hospital, 28 Kan. App. 2d 302, 16 P.3d 975 (2000), *rev'd* ___ Kan. ___, 26 P.3d 666 (2001), the fact that there may be a difference in compensation for different injuries is not only possible but even expected under the Act. Regardless of the determination of the instant appeal, such a different between compensation recovered for a whole body injury and a scheduled injury can and will occur.

BOARD MEMBER

BOARD MEMBER

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Ethan L. Vaughan, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director